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No. 08-1464

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted, and in light of the intervening (dec. June 8, 2009) and directly controlling ruling of this Court in *Caperton v. A.T. Massey Coal Co., Inc.*, — U.S. —, 129 S.Ct. 2252 (herein "*Massey*"), the judgments below should be reversed or the matter remitted for reconsideration in light of *Massey*. Petitioners were deprived of due process. *Massey* (potential that decisionmaker may have been influenced by substantial monetary inducement violated due process).

Approximately two weeks before *Massey* was decided by the Court, Petitioners on May 22, 2009 petitioned for a writ of certiorari upon their challenge to the *quid pro quo* approvals (and reversal of an initial disapproval vote), made by a local quasi-judicial body which thereupon authorized the construction and operation of a vastly oversized 350 megawatt regional electric generation facility in a local zone where such a use was otherwise prohibited. The Town Board of Respondent Town of Brookhaven, sitting as a Zoning Board of Appeals and subject in New York to procedures and limitations applicable to a quasi-judicial body,[1] voted and re-voted to grant approvals for the plant only after "negotiating" with the applicant over the payment of well over $150 million to the voting officials' favored constituents, causes and community projects. This unseemly and palpably unlawful bargaining over

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[1] *Fleck v. Town of Colden*, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) (Town Board deciding variance application acts as Zoning Board of Appeals and is subject to limitation imposed on ZBA); *Palm Management Corp. v. Goldstein*, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006) (ZBA is a quasi-judicial administrative agency).

massive sums of monies in direct exchange for governmental approvals occurred in the complete absence of legal authority under New York law, and the monetary inducement was made an *express* written "condition" of the ultimate Special Permit approval (JR 78-83).

At every stage of legal proceedings below, from the *first* pleading, and in *every* brief subsequently filed, including in every appellate court brief submitted by Petitioners, the unfair bias attributable to the *ad hoc* negotiated financial inducement was a prime (and on appeal *the* prime) basis for challenging the resulting approvals and reversal of initial disapproval vote. Even Petitioners' initial pleading below (Joint Record ["JR"] 66-67, with its accompanying and expressly incorporated points of law (N.Y. CPLR 7804[f]), identified the corrupted process and financial negotiations as a due process violation. (Petitioner's June 12, 2007 Memo of Law in Support of Petition, pp. 36-37, quoted at pp. 10-11 of the Petition herein).

As shown in the Petition, New York law does not authorize a local body hearing a special permit, variance, and environmental approval application to allow a monetary payment by the applicant to serve as an inducement to the approval. *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) (school district's resolution granting applicant tax exemption conditioned on applicant paying PILOT payment in the event casino gambling were legalized, was *ultra vires*).[2] Such a practice in the zoning

[2] The $150 million to $200 million payment by the applicant herein (JR 78-83) was not, as Respondents assert, solely a payment in lieu of taxes to an industrial development agency (an

approval context, and more egregiously, in a quasi-judicial variance, special permit and environmental review context, and occurring in the complete absence of any authorizing legislation, results in a clear deprivation of due process infusing bias and improper influence into the governmental decision-making process. *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008); *Township of Marlboro v. Planning Bd. of Tp. of Holmdel*, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995); *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988); *see* 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007); *Citizens to Save Minnewaska v. New Paltz*

"IDA" PILOT agreement). To the contrary, the approval specifically stated that significant portions of the millions of dollars paid were to go to specified civic associations and other favored constituencies (*id.*). Moreover, even the portion identified as being paid to the IDA as a payment in lieu of taxes was not something the Town Board possessed authority to negotiate. New York law allows only an IDA to negotiate and enter a PILOT agreement, not a quasi-judicial zoning board hearing a variance, special permit and environmental application. N.Y. General Municipal Law § 874 (authorizing only *the IDA* to enter into PILOT agreements, not the Town Board; and requiring that the PILOT agreements be made pursuant to "a uniform tax exemption policy" of the IDA, not a Town Board negotiated payment made as an inducement and condition of a special permit approval). In fact, there is absolutely nothing in the Record to indicate that the IDA procedures were even pretextually followed prior to the special permit grant and community benefits package condition here. It was only during the appeals herein that the applicant divulged that an after-the-fact IDA agreement had been reached concerning some portions of the $150-$200 million in payments.

Central School District, *supra*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983).

As New Jersey appellate courts have recognized, an applicant who makes such a large monetary payment as part of the permitting process obviously expects to get something for the payment, in a *quid pro quo* fashion. *Township of Marlboro*, *supra* ("[Such an] illegal exaction constitutes a blatant *quid pro quo* for the approval, either demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality in circumstances in which the exaction is unrelated to any legitimate land use concerns"). The bias brought about by the consideration of the monetary payment in the complete absence of legislative authority, standards and limitations on such unseemly bargaining, amounts to "free-wheeling bidding [which] . . . is *grossly inimical* to the goals of sound land use regulation" and constitutes an "*intolerable spectacle* of a [town] board haggling with an applicant over money [such as to] too strongly suggests that variances are up for sale." *Nunziato*, *supra*.

This Court's recent ruling in *Caperton v. A.T. Massey Coal Co., Inc.*, — U.S. —, 129 S.Ct. 2252 (June 8, 2009), establishes that even in the absence of a "*quid pro quo*" arrangement for a favorable determination in direct exchange for a monetary payment, due process is violated where a judicial officer (in that case a state Supreme Court Judge), renders a decision on a case where there is a likelihood that the monetary payment could cause prejudgment or bias.

Specifically, the *Massey* decision makes clear that a judge (or in this case, quasi-judicial decisionmakers) violates due process by presiding over a case

when the judge or decisionmaker objectively might be biased by a participant's substantial financial influence. The applicable test is whether, "under a realistic appraisal of psychological tendencies and human weakness," the financial interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Even when there is no actual "quid pro quo," this Court nonetheless held, "We find that [the party]'s significant and disproportionate influence—coupled with the temporal relationship between the [influence] and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' " *Id.* (internal citations omitted). This Court further instructed that where, as here, the decisionmaking process is tainted by a participant's financial influence and payments, " 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " *Massey* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The constitutional limitations and permissible bounds of due process addressed by this Court in *Massey* are not limited to judges, but apply with equal force to other decisionmakers, as in the case at bar, which exercise other types of quasi-judicial or administrative functions. *See* n. 1 *supra*; *see generally Massey* (framing the constitutional issue with regard to judges and decisionmakers, and specifically citing to this Court's prior holdings in *Withrow v. Larkin*, *supra* (medical licensing boards) and *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists)).[3]

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[3] *Accord Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007) (zoning decision "tainted with fundamental

The Respondents, in opposing this Petition, as they did in the New York courts below, merely resort to contending that the monetary payment did not bias the voting board members and did not influence them. This is, to say the least, a speculation finding no basis in the record which shows: (1) that the monetary payment was made an express "condition" of the approvals (JR 78-83); (2) the Town Board initially voted *against* the environmental approval and, only *after* the applicant increased the monetary inducement by over one million dollars and one of the board members negotiated with the applicant over specific projects for his District, did that board member change his vote (JR 3514); and (3) the overt statements of the other board members (including its Supervisor, as the presiding member) that they did, in fact, deem the monetary payments to form a part of the decisionmaking process and that they did in fact negotiate with the applicant before rendering the approvals (JR 3514; Appeal No. 3 Record 180-181).

As previously quoted in the Petition herein, Town Board Councilman Timothy Mazzei, the member who changed his vote between June 6th and July 25th, made clear on the record in a Town Board meeting during that period, that he was negotiating the *amount* of the payment with the applicant. His full statement on the record reads:

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procedural irregularity" gives rise to substantive due process claim); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (enforcing due process restrictions and limitations on members of a state barber licensing board, and noting that "[t]he regular and impartial administration of public rules governing [liberty and property] interests, as required by due process, prohibits the subtle distortions or prejudice and bias," even where no class-based or other generalized invidious discrimination motivates the adverse treatment of a particular applicant).

> "*I indicated very early on that one Council person, not six, negotiated this, this benefit package with LIPA [respondent Long Island Power Authority] and Caithness. That bothered me. It still bothers me.* I didn't think it was right. *When it was clear that you didn't have the votes, well, then all of a sudden, they became important because a vote was needed.* They came to me very professionally, very intelligently. I spoke with Ross [Ain] who is an extremely nice man, extremely intelligent man. He has explained everything very well to me. And, that with LIPA representatives, also very professional, very intelligent. And, I indicated to them that I wasn't going [to] negotiate. That was my exact words. *I said I wasn't happy. I felt that more benefits should have come to my district because . . . to do that and I'll listen and I'll take into consideration.'* But, I never said, *'I'm negotiating with you.' I never said, 'I want this, this, and the other thing'. They came to me and said, we're prepared to do additional things to try to satisfy you and I, and I listened to them.*" (JR 3514) [emphasis supplied].

The Town's Supervisor (the Presiding member of the Town Board) also made clear on the record that the Town's approval was directly motivated by obtaining otherwise unavailable funds for popular community projects:

> "*Between the pilot [payment in lieu of taxes] payments between and community benefits package that was very ably negotiated by Councilwoman Kepert, Councilman Mazzei, Councilwoman Walsh and all the Town Board,*

> *we're able to do things with this particular power plant proposal that will enable communities who otherwise would never have been able to meet their public mission, whether it's the Village of Patchogue, the village of Bellport or this township of Brookhaven, whether it's the Boys & Girls Club Of North Bellport, whether it's the South Country School District. The list goes on and on as to how this is going to benefit a whole multitude of peoples, a whole multitude of public organizations. And this is the opportunity that, yes, we seek because it gives us the ability to do things what otherwise would not be done."* (Appeal No. 3 Record 180-181).

The Respondent Caithness' contention that there was no change in vote concerning the environmental approvals,[4] or that the million dollar plus increase

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[4] Most disturbing, the applicant, Respondent Caithness, falsely states in its brief in opposition to this Petition, at p. 10, that (italics added to false statements):

> The Project appeared on the Town Board's calendar for June 6, 2006. . . . *Two members of the Town Board stated at that time that they needed more time to evaluate the Project. JR 3477-78.* Therefore when the motion on the SEQRA findings resolution was made, the Town Board voted 4 to 3 not to adopt it *at that time.*

The contention is flatly false as a matter of record (Appendix to Petition, 36a; 53a). In fact, the record reference cited for this after-the-fact attempt to pretend that the actual vote against the environmental SEQRA Resolution was not a vote but an adjournment, JR 3477-3478, shows the exact opposite: petitioner herein Donald Suebert spoke in opposition to the application, a call for a vote was taken, no Boardmember even hinted that they were not ready to vote on the merits of the SEQRA Resolution or "needed more time," and the vote was 4 to 3 against it, as the trial court specifically found in its Opinion below (Appendix to Petition, 36a; 53a).

in funds did not influence the Town Board, is clearly contrary to the Record. Even more so, this Court's *Massey* decision makes clear that the inevitable denials that the monetary payment was a *quid pro quo* for the approvals is not the operative consideration. The relevant factors are that the applicant's "significant and disproportionate influence—coupled with the temporal relationship between the [influence] and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Massey, supra.*

The Respondents' contentions that Petitioners lack standing or a property interest, or did not argue the same due process points they assert upon this Petition, are equally erroneous. As shown above as well as in the Rule 14(g)(i) Statement in the Petition (p. 10), the corrupting bias of the monetary inducement was the prime issue raised from beginning to end below, and it was identified as constituting a "due process" deprivation, as well as egregiously "arbitrary and capricious" conduct, which is the very definition of a substantive due process violation (JR 66-67, also incorporating June 12, 2007 Memo of Law in Support of Petition, pp. 36-37, quoted at pp. 10-11 of the Petition herein). *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003). In fact, the objection concerning the unlawful corrupting influence of the monetary payment, by its inherent nature, asserted a due process deprivation claim. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003) (even when "inexplicit, . . . the due process issue [was] within the clear intendment

of such contention and [ ] such issue [was] sufficiently presented").

Petitioners' standing is further undeniable given that they were specifically accorded standing upon their environmental challenge, and their Petition below was initially granted to the limited extent of remanding the matter to the Town Board for an "explanation" for the change in SEQRA vote (Appendix to Petition, 53a-57a).

The Respondents' apparent belief that environmental injury to petitioners' own homes is not cognizable injury in fact under Article III or is not a due process property interest, is soundly mistaken. *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that . . . interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process"); *Taliaferro v. Darby Tp. Zoning Bd.*, 458 F.3d 181, 190 -191 (3d Cir. 2006).

For the reasons stated in the Petition and above, review by this Court is fully warranted, and the judgments should be reversed or the matter remitted for reconsideration in light of *Massey*.

CONCLUSION

It is respectfully requested that this Court grant the Petition for a writ of certiorari.

Dated: July 8, 2009

Respectfully submitted,

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